United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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74-1775

United States Court of Appeals
FOR THE SECOND CIRCUIT

HUGO STINNES STEEL AND METALS COMPANY,
(Division of Hugo Stinnes Corporation),

Plaintiff-Appellant,

against

S.S. ELBE OLDENDORFF, her engines, boilers, etc.; EGON OLDENDORFF and ATLANTIC SHIPPING COMPANY, S.A.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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Statement

This is an appeal from a final order entered by the Hon. Charles M. Metzner, on March 26, 1974, dismissing the captioned action for lack of prosecution. Plaintiff also appeals from the Interlocutory Order entered September 19, 1973, denying plaintiff's motion to transfer the action from the Southern District of New York to the Southern District of Georgia, Savannah Division.

Opinion Below

Pursuant to an unopposed motion by plaintiff, the Court below refused to grant a transfer of the action pursuant to 28 U.S.C. § 1404 (a) on the grounds that the purpose of that section was not to rescue a plaintiff where the statute

of limitations had run and a new action could not be instituted in the transferee district. The Court further concluded that the claim was "stale" and that the transfer would, consequently, not be in the interest of justice.

Subsequent to that decision, the Court entered an order pursuant to Rule 23 of the General Rules for the Southern District of New York, dismissing the action for lack of prosecution.

Questions Presented

1. Should the District Court deny a change of venue pursuant to 28 U.S.C. § 1404(a) in an admiralty action where the complaint was timely filed but no jurisdiction was obtained over the defendants in the transferor district, although they knew of the pendency of the suit and some services, albeit defective, were made?

2. Should the District Court have dismissed the action for lack of prosecution?

Statutes Presented

28 U.S.C. 1404(a) reads, as follows:

> § 1404. Change of venue
>
> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Rule 23 of the General Rules for the Southern District of New York reads in relevant part as follows:

> RULE 23—Review of Causes; Dismissal for Want of Prosecution
>
> APPLICABLE IN THE SOUTHERN DISTRICT ONLY
>
> (a) Civil causes which have been pending for more than one year and are not on the trial calendar may

be called for review upon not less than fifteen (15) days' notice given by the clerk by mail addressed to the attorneys or proctors of record. Notice of the call of such causes shall be published in the New York Law Journal, or otherwise as the court directs. The court may thereupon enter an order dismissing the cause for want of prosecution, or continuing it, or may make such other order as justice may require.

Facts

The summons and complaint were filed on December 29, 1971, two days before the expiry of the one year statute of limitations as provided by the Carriage of Goods by Seas Act (46 U.S.C. 1300, et seq.). On the same day, a copy of the summons and complaint were left with a Marshal for service upon Atlantic Shipping Company, S.A., (Atlantic) but due to the fact that the defendant could not be located at the address given, a new Marshal service was delivered on January 6, 1972, which resulted in a service upon Atlantic on January 14, 1972, or 16 days after the filing of the summons and complaint [R. 9]. At the same time, a copy of the summons and complaint were forwarded to Defendant Egon Oldendorff, as owners of the vessel with the suggestion that they appear voluntarily so as to avoid the necessary attachments or order to obtain *quasi in rem* or *quasi* jurisdiction provided by the Supplemental Rules for Certain Admiralty and Maritime claims of the Federal Rules of Civil Procedure [R. 29].

Service was made upon Kersten Shipping Agency, Inc., the same party listed as Atlantic's agent on the reverse side of their bill of lading [R. 27], but the service was accepted over protest. Equally, the shipowner refused to appear and, in fact, threatened attachment of plaintiff's property in Germany in the event plaintiff took advantage of the remedies provided in the Federal Rules [R. 30].

On March 31, 1972, the attorney in charge of the case terminated his employment with plaintiff's attorneys and the file was transferred [R. 21]. In the course of the transfer of the file and due to an interoffice clerical error, the case lay dormant for approximately one year. Immediately after discovery of this error and after another service was attempted upon defendant Atlantic [R. 10], a motion was made to transfer the action to the Southern District of Georgia, Savannah Division, where personal jurisdiction could be obtained over both defendants.

The District Court denied plaintiff's motion on September 19, 1973 and subsequently dismissed the action for lack of prosecution on March 26, 1974.

No motion was ever made by defendant Atlantic to quash the service of process, but an attempt by plaintiff to obtain a default judgment over Atlantic was denied orally at the time of the calendar hearing on March 25, 1974.

After the denial of the transfer, plaintiff made extended efforts both in the State and Federal Courts of Georgia to pursue this action, but these efforts ultimately proved fruitless [R. 22-23].

POINT I

Although no jurisdiction had been obtained over defendants, the Lower Court should have granted plaintiff's motion to transfer this admiralty action to a jurisdiction where service could be had on all defendants.

This admiralty action was instituted in the Southern District of New York, which was proper venue. *Internatio-Rotterdam Inc.* v. *Thomson,* 218 F. 2d, 514 (5th Cir. 1955).

Over and above the fact that an admiralty action may be instituted in any District Court of the United States,

plaintiff here had additional reason to believe the Southern District was the proper venue by virtue of the legend appearing on the reverse side of the very bill of lading here at issue [R. 27]. After it became evident that no jurisdiction could be obtained in New York, a motion was made to transfer the case to a jurisdiction where service of process could be effected against all defendants.

Although 28 U.S.C. 1404(a) is usually availed of by defendants in transferring actions to jurisdictions where they are better able to defend, there is nothing in the statute which precludes a plaintiff from utilizing the statute to transfer a case to a jurisdiction where service may be had on defendants. Moore, Federal Practice ¶ 0.145 [4.-2]; and ¶ 0.145 [6.-2]. As Professor Moore states at p. 1791.

> "At times the plaintiff may not be able to obtain effective service of process on the defendant, he may seek a change of venue to a district where service can be obtained. If the transferor-district court has subject matter jurisdiction and the venue in the transferor-district is proper, failure of plaintiff to effect service in the transferor-district should not operate as a rigid bar to a transfer to a district where venue would be proper and service could be made on the defendant."

See Also *McKee* v. *Anderson,* 272 F. Supp. 684 (W.D. Missouri, 1967); *Orzulak* v. *Federal Commerce and Navigation Co., Ltd.,* 168 F. Supp. 15 (E.D. Pa. 1958).

In *Goldlawr* v. *Heiman,* 369 U.S. 463, 82 S. Ct. 913 (1962), the court held that a plaintiff who had instituted an action in an improper forum could transfer the action to a proper forum pursuant to 28 U.S.C. 1406 even though no jurisdiction had ever been obtained in the transferor forum. There, as here, the plaintiff had attempted a service on the defendants, which was ultimately determined to be defective. Furthermore, the plaintiff could not have

instituted a new action in the proper forum because the action would have been dismissed due to the running of the statute of limitations. In allowing the transfer, the court in *Goldlawr, supra,* held that the timely filing of a complaint showed dilligence and that §1406(a) was specifically intended to allow a party to remedy a technical defect without losing his substantive cause of action.

This proposition was even more forcefully stated by Judge Bonsal in *Callan* v. *Lillybelle Ltd.,* 39 F.R.D. 600 (S.D.N.Y. 1966) where he stated at p. 602:

> "§1404(a) and its companion section, §1406(a), were intended to avoid the harsh result of dismissal of an action brought by plaintiff in an improper district, especially where such dismissal would terminate plaintiff's rights because the statute of limitations has run."

Judge Metzner in his decision of September 19, 1973 placed great emphasis on the fact that *Goldlawr, supra* involved service of the summons and complaint prior to the expiry of the statute of limitations. In distinguishing the instant case, Judge Metzner incorrectly noted that no service had been attempted on any of the defendants. Even assuming an attempted service was required, the affidavit of Mr. Ryniker in support of the motion to transfer [R. 13, 14] clearly states that a service upon Atlantic was made, although accepted under protest.

Furthermore, the fact that service was attempted after the expiry of the statute of limitations is of no consequence, as long as the action was timely filed. *Internatio-Rotterdam, Inc.* v. *Thomson, supra,* where the court stated at pp. 515-516:

> "It is proper to institute a suit in admiralty in a district in which there is no person who can be served with process and no property which can be seized, if

> it is made to appear that property which can be seized under process therein is expected to be within the district shortly; and when suit is so instituted it constitutes the bringing of suit within the requirements of 46 U.S.C.A. § 1303(6) that suit be instituted within a period of one year, even though process is not issued until after the expiration of the one year period. Ore Steamship Corp. D/S A/S Hassel, 2 Cir. 137 F. 2d, 326, 329 . . ."

The lower court placed great emphasis on the fact that plaintiff was requesting transfer so as to save itself from being barred by the statute of limitations in the proposed transferee district. This is precisely why the motion was made. In fact, it is one of the underlying intentions of 28 U.S.C. 1404(a). The remedial effect of the procedure for a motion for change of venue was succinctly stated by the court in *Orzulak, supra,* at p. 18:

> "In All States Freight v. Modarelli, 3 Cir., 1952, 196 F. 2d, 1010, Judge Goodrich pointed out, at page 1011, that 28 U.S.C.A. § 1404(a) avoided the danger of having plaintiff's action barred by the statute of limitations through having to start another suit in the forum found to be appropriate."

Additionally, *Internatio-Rotterdam, Inc.* v. *Thomson, supra, Orzulak* v. *Federal Commerce & Navigation Co., Ltd., supra; Teetes* v. *Hawker,* 278 Fed. Supp. 834 (N.D. W. Va. (1968), and *Leith* v. *Oil Transport Co., Inc.,* 321 F. 2d, 591, (3rd Cir. 1963) all involved cases where the plaintiff would have been barred by the statute of limitations if a new action had to be instituted rather than having the pending action transferred.

Since both defendants in this Admiralty action had notice of the pendency of the action, and since the stated intent of § 1404(a) is remedial to allow a transfer if a new action would be barred by the statute of limitations, the transfer should have been granted.

POINT II

Plaintiff's cause should not have been dismissed for lack of prosecution.

After the denial of the transfer by the lower court, plaintiff attempted to undertake an action in the Southern District of Georgia, based upon a theory that the statute of limitations was tolled during the pendency of the New York action. Again, all defendants were served and defendant, Atlantic appeared in that action and was ultimately successful in having it dismissed. Again, defendant, Oldendorff did not appear.

The plaintiff here was actively pursuing his cause, albeit not in this district, and gave no indication of abandoning the action. In such a situation, the court ought to allow the action to proceed so that a judgment can be rendered on the merits. *Meeker* v. *Riley*, 324 F. 2d, 269 (10th Cir. 1963). This is especially so where no prejudice has been shown on part of defendant. *United States* v. *Greitzer*, 18 F.R.D. 307 (E.D. Pa., 1955).

All defendants can be served in the district to which plaintiff desired to have this action transferred and a dismissal herein would be a "doom . . . altogether too final and definitive", *Lyford* v. *Carter*, 274 F. 2d, 875 (2 Cir. 1960).

CONCLUSION

The order dismissing the cause for lack of prosecution should be reversed and the case remanded to the District Court with an order allowing the District Court to transfer the action to the Southern District of Georgia, Savannah Division.

Respectfully submitted,

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CASPAR F. EWIG

(56419)

UNITED STATES COURT OF APPEALS
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Defendants-Appellees.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON, being duly sworn, deposes and says that he is over the age of 18 years. That on the 26th day of July, 1974, he served two copies of Brief for Plaintiff-Appellant on Haight, Gardner, Poor & Havens, Esqs., the attorneys for Defendants-Appellees by delivering to and leaving same with a proper person in charge of their office at One State Street Plaza in the Borough of Manhattan, City of New York, between the usual business hours of said day.

David F. Wilson

Sworn to before me this
26th day of July, 1974.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472020
Qualified in New York County
Commission Expires March 30, 1976